

1
2 UNITED STATES BANKRUPTCY COURT

3 DISTRICT OF DELAWARE

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5 In the Matter of:

6
7 UPHEALTH HOLDINGS, INC., et al., Case No.
8 Debtors. 23-11476-LSS

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12 United States Bankruptcy Court
13 824 North Market Street
14 Wilmington, Delaware

15
16 October 9, 2024
17 2:09 PM

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20 B E F O R E:
21 HON. LAURIE SELBER SILVERSTEIN
22 U.S. BANKRUPTCY JUDGE

23
24 ECR OPERATOR: ALYCE DOODY
25

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2 1. Motion of Debtor UpHealth Holdings, Inc. for Entry of Orders
3 (I) (A) Approving and Authorizing Bidding Procedures in
4 Connection with the Sale of UpHealth Holdings, Inc.'s Interest
5 in TTC Healthcare, Inc., (B) Authorizing Procedures to
6 Designate Stalking Horse Bidder and (C) Granting Related Relief
7 and (II) (A) Authorizing Sale of UpHealth Holdings, Inc.'s
8 Interest in TTC Healthcare, Inc. to the Successful Bidder and
9 (B) Granting Related Relief [D.I. 810; Filed 7/17/2024].
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Transcribed by: River Wolfe

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7 ALSO PRESENT:

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9 CAROLYN B. FOX (ZOOM)

10 DAVID MOHAMED (ZOOM)

11 JONATHAN RANGLES (ZOOM)

12 KENNEDY ROSE (ZOOM)

13 DAVID ZUBKIS (ZOOM)

1 P R O C E E D I N G S

2 THE CLERK: Please rise.

3 THE COURT: Please be seated.

4 MR. MARTIN: Good morning, Your Honor. Good
5 afternoon. Sorry.

6 THE COURT: Good afternoon.

7 MR. MARTIN: All confused. Mr. Brown's out of town,
8 so I'm all mixed up. He asked me to come over and introduce
9 Ms. Willis, who will be handling the single matter on the
10 agenda. So I will turn it over to her --

11 THE COURT: Thank you.

12 MR. MARTIN: -- at this time.

13 MS. WILLIS: Good afternoon, Your Honor. For the
14 record, Jamila Justine Willis of DLA Piper LLP (US) on behalf
15 of the debtors, UpHealth Holding, Inc. and certain of its
16 debtor affiliates.

17 So before getting to our agenda, Your Honor, we want
18 to thank the Court for accommodating our request for shortened
19 notice on this matter. Your Honor, we're here this morning on
20 the supplement to the motion of debtor UpHealth Holding, Inc.
21 for entry of orders approving and authorizing bidding
22 procedures in connection with the sale of UpHealth Holding,
23 Inc.'s interest in TTC Healthcare, Inc., authorizing procedures
24 to designate stalking horse bidder, and granting related relief
25 and authorizing sale of UpHealth Holding, Inc.'s interest in

1 TTC Healthcare to the successful bidder and granting related
2 relief, which is filed at docket number 980 on September 22nd.

3 Before we get started with the motion supplement
4 itself, I'd like to request the acceptance of the declaration
5 of Mr. Michael Krakovsky in support of the supplement to the
6 bidding procedures motion, which was filed at docket number 981
7 into evidence. Mr. Krakovsky is here in the courtroom today,
8 should anybody be interested in questioning him.

9 THE COURT: Okay. Is there any objection to the
10 declaration coming into evidence?

11 UNIDENTIFIED SPEAKER: No, Your Honor.

12 THE COURT: I hear none. It's admitted.

13 (Declaration of Mr. Krakovsky was hereby received into
14 evidence as Debtors' Exhibit --, as of this date.)

15 MS. WILLIS: Thank you, Your Honor.

16 Your Honor, by the bid procedure supplement, the
17 debtors are seeking approval for this Court to enter into the
18 commitment letter and be bound specifically by the binding
19 provisions of that commitment letter. Your Honor, while this
20 is not exactly as was contemplated, the debtor's sale process
21 of the TTC interests has been successful in that it resulted in
22 the identification of the purchaser and the execution of the
23 commitment letter.

24 The debtors engaged in a significant marketing process
25 that involved contacting 150 parties, 50 of whom executed NDAs.

1 And that process resulted in the commitment letter, which
2 represents the best actionable proposal available for
3 maximizing the value of TTC's interests. And the commitment
4 letter is supported by the debtor's key economic stakeholders,
5 including the committee and the ad hoc group of holders of the
6 2025 secured notes.

7 The sole objector is the U.S. Trustee.

8 And at this stage, we are seeking approval of
9 authority to enter into the commitment letter and be bound by
10 its binding provisions. And of course, there are appropriate
11 fiduciary outs subject to the payment of the bid protections if
12 they are approved following the entry into the SPA. If Your
13 Honor has any questions, I'm available to answer them.
14 Otherwise, I can concede the podium to the U.S. Trustee.

15 THE COURT: I don't have questions at this time, but I
16 do have questions. But I'll ask them after I've heard the
17 objections. Okay.

18 And first I'd like to ask, Mr. Schepacarter, do you
19 wish to cross-examine Mr. Krakovsky?

20 MR. SCHEPACARTER: Actually, I do have a couple of
21 questions, though, on his declaration so --

22 THE COURT: Okay.

23 MR. SCHEPACARTER: If we want to swear him in now
24 (indiscernible) --

25 THE COURT: Okay. Thank you.

1 MR. SCHEPACARTER: If you want to swear him in, that
2 would be fine, Your Honor.

3 THE COURT: Okay. Mr. Krakovsky.
4 If you can remain standing, please --

5 MR. KRAKOVSKY: I'm sorry.

6 THE CLERK: Thank you.

7 THE COURT: -- we'll swear you in.

8 THE CLERK: Okay. Please raise your right hand.

9 (Witness sworn)

10 THE CLERK: Please state your full name and spell your
11 last name for the record.

12 THE WITNESS: Michael Krakovsky. Last name is spelled
13 K-R-A-K-O-V-S-K-Y.

14 THE CLERK: Thank you. You may be seated.

15 CROSS-EXAMINATION

16 BY MR. SCHEPACARTER:

17 Q. Afternoon, Mr. Krakovksy. My name's Richard Schepacarter
18 of the United States Department of Justice, Office of the
19 United States Trustee. Just have a couple questions based on
20 your declaration. You don't happen to have a copy of that in
21 front of you, do you?

22 A. I do not.

23 MR. SCHEPACARTER: Okay. See if they have -- counsel
24 may have just a couple.

25 May I, Your Honor?

1 THE COURT: You may.

2 MR. SCHEPACARTER: Thanks.

3 THE WITNESS: Thank you.

4 Q. From reading your declaration, I understand you were
5 involved in the sale process, correct?

6 A. Yes.

7 Q. All right. Just a couple questions on it. The big
8 protections that were offered in this case, roughly 750,000
9 dollars for the breakup fee and then another half-a-million
10 dollars for expenses. Do you know if that half-a-million
11 dollars of expenses matches the actual expenses that were
12 incurred by the prospective purchaser?

13 A. I don't know for certain. I am under the impression that
14 a lot of the expenses would be incurred from the date of
15 approval of these bid procedures to the closing.

16 Q. Do you know if the, we'll call it, prospective purchaser,
17 if he incurred expenses doing any kind of due diligence?

18 A. Yes, for sure.

19 Q. Okay. And explain that if you can.

20 A. Well, I know for certain that they had counsel that was
21 involved. So clearly, they were third-party expenses in
22 connection with their analysis of the transaction. I'm not
23 aware of other financial advisors that may have been retained.
24 They also had -- they visited the facility a few times, so
25 there would have been travel expenses. I'm not sure if that

1 would be covered, you know, under the out-of-pocket expenses as
2 well.

3 Q. Okay. When you say "they", you're talking about the
4 purchaser (indiscernible) --

5 A. Correct. The private equity firm.

6 Q. -- counsel?

7 A. Correct.

8 Q. Private equity firm? Okay. All right. And did other
9 purchasers spend time in the -- we'll call it the due diligence
10 room?

11 A. Yes.

12 Q. And how much time did they spend? Less or more than the
13 purchaser that you know?

14 A. It's hard to know. A lot of times, buyers will download
15 the full contents of the data room, so it's not as if we
16 monitor, you know, actual time spent in the data room. That
17 wouldn't really be indicative. So we know how many parties
18 have accessed the data room, but we don't know their engagement
19 beyond just accessing it and potentially downloading the full
20 contents.

21 Q. You can't tell how much time they spent in the data
22 room --

23 A. So it may be --

24 Q. -- (indiscernible) downloads or --

25 A. It's possible that's a feature that we could look at.

1 It's just not that meaningful because most parties would
2 download as opposed to dealing with the cumbersome data room.
3 They would download it locally and have access to it.

4 Q. All right. Do you know if other purchasers spent time
5 visiting the facility?

6 A. Yes.

7 Q. Okay. More or less than the prospective purchaser?

8 A. Well, the purchaser had several visits, so that would be
9 more than any other party. They've spent more time at the
10 facility than other parties.

11 Q. All right. All right. Now, you make a conclusion in your
12 declaration, paragraph 10. You say, further, I believe that
13 the bid protections are fair and reasonable under the
14 circumstances and are necessary to induce the purchaser to
15 consummate a transaction that will maximize the preserved value
16 of the estate. And I want to take that in little bits if we
17 can.

18 You say that the bid protections are fair and reasonable
19 under the circumstances. What does that mean?

20 A. Well, for one, we believe it is essential for this bidder
21 to proceed is to grant these bid procedures. That's what's
22 been communicated to us from the buyer, prospective buyer. And
23 there are -- you know, we're aware of what the typical bid
24 projections would look like. More typically three percent,
25 plus expense reimbursement. Under the circumstances, we think

1 that it is still a net positive to the estate of approving
2 these bid protections, you know, relative to what the other
3 options are.

4 Q. Right.

5 A. So we think this is the best -- the best outcome.

6 Q. And you say net positives. What do you mean by net
7 positives?

8 A. Considering the likelihood of the bid protections actually
9 being paid out in the context of an over bid. So we think
10 we're confident this is the best, highest and best, option for
11 the estate. So with that framework, we think that we're
12 supportive at Stout of granting these bid protections -- bid
13 protections and think it's reasonable under these
14 circumstances.

15 Q. Okay. And you say it's the best option. Is that because
16 of the fact that there weren't any other bids made?

17 A. There were other bids made.

18 Q. There were other bids? Okay.

19 A. Yes.

20 Q. But you think this one, in your professional opinion, this
21 is the highest and best offer?

22 A. That's correct.

23 Q. You say it was necessary to induce the purchaser to
24 consummate the transaction? Why is it -- why was it necessary?

25 A. It's been a heavily negotiated term. I mean, we have --

1 what you see in the commitment letter reflects negotiations
2 that we've had on those terms. So the prospective buyer
3 initially requested even higher bid protections than what's in
4 the commitment letter. And we negotiated those down. And
5 they've indicated to us that these are essential for them
6 moving forward and incurring the expenses of actually
7 negotiating and signing up to an SBA.

8 Q. Do you think that these protections encourage fair and
9 open bidding and a fair-market auction price and the like?
10 Fair-value marketing of the process?

11 A. Well, we -- we've run an exhaustive process, and we're --
12 we're under exclusivity with this buyer right now. So we think
13 there's a very low likelihood of someone unsolicited coming in
14 at a higher price. Whether these bid protections were 700 plus
15 500 or something substantially lower.

16 Q. Now, the exclusivity, let's talk about that one. The
17 exclusivity, explain that to me what that entails.

18 A. So I don't have the commitment letter in front of me, but
19 I do know that it's a four-week exclusivity period that
20 terminates October 18th, and it prohibits the debtors from
21 engaging with other third parties during that time frame with
22 respect to this transaction.

23 Q. All right. So do you really need bid protections if the
24 shop is closed?

25 A. Well, we do, because what we've been told is that the

1 prospective buyer is not going to consummate the transaction
2 and incur the legal expenses associated with negotiating the
3 SPA unless these bid protections are approved.

4 Q. So he has bid protections, plus a closed shop? Is that
5 what you're --

6 A. He has a closed shop. I don't think this is that
7 atypical. In many scenarios, if you don't have a stalking
8 horse, you may file bid protections -- bidding procedures with
9 bid protections, and prospective buyers would know that if they
10 do the work and sign up to be the stalking horse bidder, that
11 they will have bid protections.

12 Q. All right. What was the last time you had a closed shop
13 sale?

14 A. I can't recall. It is atypical in a 363 process.

15 Q. Did you say atypical?

16 A. Atypical.

17 Q. Okay. All right. And the last part of that is based on
18 what you've told me so far, how does all of that maximize and
19 preserve the value of the estate?

20 A. Closing with this prospective buyer is value maximizing to
21 the estate. This prospective buyer has indicated very clearly
22 to us that getting approval of these bid protections are
23 essential to them proceeding in this transaction. So that's
24 how we maximize this value. And again, we think there's a very
25 low likelihood that if lower bid protections were granted as

1 opposed to these, that that would impact the likelihood of a
2 prospective overbidder coming in in this time frame.

3 Q. Right. Even during the -- you said the shop was closed.
4 Is the shop going to open? Is that what you're telling me?

5 A. Well, right now, we're not talking to other buyers. We're
6 under a four-week exclusivity.

7 MR. SCHEPACARTER: Okay. All right. All right. Your
8 Honor, I don't have any further questions. I'll reserve for
9 recross if I need it (indiscernible).

10 THE COURT: Thank you.

11 Any redirect?

12 MS. WILLIS: Yes. Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MS. WILLIS:

15 Q. Okay. Hi, Mr. Krakovsky. Can you repeat when exclusivity
16 expires under this bid?

17 A. It was a four-week exclusivity. I believe it expires
18 October 18th -- 18th. Next Friday.

19 Q. And are we likely to close before October 18th?

20 A. We are not.

21 Q. Thank you. I'd also like to -- do you have a copy of the
22 commitment letter before you?

23 A. I do not, no.

24 MS. WILLIS: Your Honor, the commitment letter is
25 attached to the supplemental motion as exhibit B. May I

1 approach and bring a copy up?

2 THE COURT: You may.

3 Q. Do you see on page 3 of the commitment letter, the
4 paragraph that says, "certain protections"?

5 A. Yes, I do.

6 Q. Okay. Are you familiar with that paragraph?

7 A. Yes.

8 Q. Could you explain what you understood about what happens
9 after exclusivity expires?

10 A. Well, I'm not sure that I need to look at the paragraph.
11 My understanding post-exclusivity is we would have the right on
12 behalf of the debtors to engage with other third parties.

13 Q. Correct. And does the commitment letter give the debtor
14 as a fiduciary out?

15 A. It does.

16 Q. And what does that mean, a "fiduciary out"?

17 A. If the debtors receive a higher and better offer, we could
18 basically switch paths and go with a different party that
19 maximizes value.

20 Q. Okay. And could you read the first sentence of the
21 paragraph "certain protections"?

22 A. Sure. If any of the provisions set forth in the paragraph
23 labeled 'exclusivity' or the subparagraph labeled 'bid
24 protections' in the paragraph labeled 'bid considerations' is
25 amended or modified in any way or rejected by the bankruptcy

1 court, F3 and Beck shall be entitled to terminate all
2 discussions regarding the transactions at their sole
3 discretion.

4 Q. And what is your understanding about F3 and Beck's
5 position with respect to exclusivity and the bid protections?

6 A. That if this isn't granted, they're not going to move
7 forward.

8 MS. WILLIS: Okay. Thank you.

9 That's all, Your Honor.

10 THE COURT: Any redirect?

11 You can step down.

12 MR. KRAKOVSKY: Okay.

13 THE COURT: Thank you.

14 Mr. Schepacarter.

15 MR. SCHEPACARTER: Yes, Your Honor. Richard
16 Schepacarter for the United States Trustee.

17 Your Honor, I'm not going to belabor our objection. I
18 think it's pretty straightforward. The test here is that the
19 movant to prove that the bid protections, bid procedure
20 protections, the breakup fee, the expense reimbursement are
21 expenses that can be allowed under 503(b)(1)(A) basically
22 necessary to preserve the assets of the estate.

23 Problematic here is I'm not going to go into, like,
24 great detail, but the bid protections here are over the
25 customary what we usually do, three-and-a-half percent or

1 whatever. It's around eleven percent if you take them all
2 together. It's happening at the end of the process, so to
3 speak. And this is a former insider. So I know that we've
4 argued that necessarily insider. And we don't have any
5 testimony at this point, but either today, insiders don't
6 necessarily have -- I wouldn't say an incentive, but they've
7 already been on the inside of the data room when they were on
8 the inside when they were insiders. So they know, or you would
9 think they would know, what's going on with respect to the
10 company.

11 The fact that he did testify -- that Mr. Krakovsky did
12 testify with respect to the prospective purchaser being in the
13 data room. It's a different data room than what used to be a
14 data room, which was actually a room. Now, you just download
15 everything, and you can look at it, I guess, at your leisure.

16 THE COURT: I'm fascinated at that because it lets all
17 that confidential, proprietary information be out there in the
18 world with no controls. But I heard it too. It surprised me.

19 MR. SCHEPACARTER: It's, I don't know, twenty-first
20 century.

21 THE COURT: Um-hum.

22 MR. SCHEPACARTER: As I indicated to counsel earlier,
23 I struggle with technology, and I somehow struggle with the
24 twenty-first century going forward, but be that as it may.

25 With respect to this purchaser, problematic here and

1 it's funny because I asked the witness when the last time he
2 had a closed shop provision, and I can't remember one.

3 THE COURT: Long time.

4 MR. SCHEPACARTER: And I've been doing this since the
5 '90s. Here, even in Delaware, I've been doing this since 1999.
6 And I can't remember one. I just can't remember one. And then
7 my memory bank doesn't go back that far anymore. But I can't
8 remember one in the recent fifteen years, maybe twenty years
9 closed shop. I mean, that was kind of -- I thought that went
10 away years ago --

11 THE COURT: Um-hum.

12 MR. SCHEPACARTER: -- so that even though the
13 exclusivity will go away so that that opens up eventually it
14 sounds to me like it's the old belt and suspenders. You need a
15 belt. That's fine. You need suspenders. That's fine. But
16 you don't need both so to speak.

17 I guess the other part of it is that testimony was
18 that -- bordering on hearsay, but we'll take it at what it's
19 worth -- that the purchaser will walk away, that they're not
20 going to be -- if they don't get bid procedures, they're going
21 to walk away. And that may be, but that still isn't the test
22 of whether or not that the expense is necessary to preserve the
23 value of the estate because even if the purchaser walks away,
24 this asset can still be marketed. It's been marketed. We
25 understood that. It's been a robust marketing and the like.

1 But even though the purchaser may or may not at its
2 option. Didn't say he was. Just, I think it was a testimony,
3 and I could be wrong that they had the option -- that
4 agreement, that letter, said they had the option of walking
5 away, so they had that out, just like the debtor has the
6 fiduciary out. And I understand that.

7 But I just don't think it meets that test, that
8 O'Brien test, that 503(b)(1)(A) test, necessary value of the
9 estate, like an operating expense to buy inventory to make
10 goods, that type of expense going forward. Keep the lights on.
11 I don't know that it satisfies that in this case, the bid --
12 and even though it seems like it's crucial, it doesn't satisfy
13 necessarily those aspects of what the admin expense is supposed
14 to be under O'Brien. So thank you, Your Honor.

15 THE COURT: Thank you.

16 Ms. Willis.

17 MS. WILLIS: Thank you, Your Honor. Jamilla --

18 THE COURT: Yeah. Let me tell you what I'm concerned
19 about, in addition to what Mr. Schepacarter has raised. When I
20 looked at, really, the summary of material terms, I think there
21 are a lot of items in here that are protections --

22 MS. WILLIS: Um-hum.

23 THE COURT: -- that you have to consider together and
24 that the debtor is asking me to approve. But the first thing I
25 note is that due diligence is not complete. So this

1 prospective purchaser wants me to approve bid protections and
2 the context in which he's not committed to this deal. I don't
3 think I've done that.

4 MS. WILLIS: Yeah.

5 THE COURT: Number two, the exclusivity provision, I
6 can't remember the last time I saw a no shop either, but I'm
7 guessing late '80s.

8 And interesting, too, that the prospective purchaser
9 gets a right of first refusal with respect to any proposed
10 company transaction received during the exclusivity period. So
11 to the extent that somebody did come forward, the debtors
12 couldn't talk to them. But if they gave them a higher bid --
13 well, first of all, I'm not sure why they would because there's
14 a right of first refusal here. So I view that as a
15 disincentive, the exclusivity period and the right of first
16 refusal as a disincentive.

17 Then I've got the breakup fee and expense
18 reimbursement, which are higher than normal. And then I've
19 got -- I'm not sure what. An additional expense reimbursement
20 if the purchasers are willing to go forward, but the debtor for
21 some reason isn't. So it's this entire -- which I don't know
22 exactly what that is, and it wasn't discussed. But I don't
23 know if that's additive, if it's part of the breakup fee, or
24 what it is.

25 But this entire universe of protections, and I think

1 they're all protections, for the prospective purchaser who is
2 an insider is problematic from a bankruptcy court systemic
3 perspective. And I need to understand why this package is
4 necessary, other than the fact that the purchaser says it has
5 the option to walk. Because if I start giving out packages
6 like this, I don't know where it ends.

7 MS. WILLIS: Your Honor, thank you for your questions.
8 So Your Honor, we've been before you before in front of the
9 protections that are similar. We understand your concerns.
10 And we did take those concerns into consideration when we
11 negotiated --

12 THE COURT: What was similar to -- that you've been in
13 front of me that's similar to this combination of a package?

14 MS. WILLIS: Your Honor, do you remember Rudy's? I
15 believe it was filed in March of 2020, which is frankly a
16 month. I would like to forget.

17 THE COURT: Sure. But Rudy's probably was -- it was
18 the restaurant -- it was a restaurant?

19 MS. WILLIS: The hair --

20 THE COURT: Oh, the hair place.

21 MS. WILLIS: The barbershop, yes.

22 THE COURT: Okay. I had several, and they were all
23 COVID related.

24 MS. WILLIS: Yes.

25 THE COURT: And what we did during COVID may be very

1 different than what we're going to do not during COVID. I
2 don't remember that particulars, but no. I mean, there can
3 definitely be a COVID exception.

4 MS. WILLIS: Right. And I appreciate that, Your
5 Honor. So I want to answer all of your points in order. So
6 the first was that you said diligence was not complete and
7 you're being asked to approve bid procedures when the purchaser
8 is not committed.

9 THE COURT: Not committed.

10 MS. WILLIS: Your Honor, the bid protections would not
11 even come into place until the SPA was signed and submitted to
12 the Court. So you're being asked, essentially, similar to what
13 we've requested in the motion itself and similar to what we
14 said we were going to do, which is filing a supplement, you're
15 being asked to really preview those, and they would only be bid
16 protections if the purchaser signed the SPA, which is currently
17 not signed, because as you said they're undergoing diligence,
18 and if that was filed with the Court. So it's a little bit
19 like a naked sail, Your Honor, rather than filing for bid
20 protections when they haven't actually committed to anything.

21 THE COURT: Okay.

22 MS. WILLIS: The second point you made, Your Honor,
23 was as to exclusivity. You said that you haven't seen no-shop
24 provisions recently and also that they have the right of first
25 refusal. I do want to emphasize that they have I think it's

1 ten more days of exclusivity in total. The exclusivity
2 provision here, Your Honor, we sometimes do see these, but they
3 often happen pre-petition. Unfortunately, Your Honor, I feel
4 like we're always saying this. This case is atypical, which it
5 is.

6 You might remember, Your Honor, when we filed, we
7 filed with a naked petition, and we weren't really certain of
8 what was going to happen in the bankruptcy case. The TTC sale
9 essentially came in as a strategy that we were going to
10 implement to maximize the value of the estate this summer. So
11 we had not anticipated the sale of TTC and certainly the
12 interest that UpHealth Holdings has in TTC back when we filed
13 this case in October. Otherwise, that exclusivity provision
14 might have happened pre-petition.

15 So we only have another ten days of exclusivity. It's
16 unlikely that we'll be in a position to -- first, we're not
17 going to be in a position to close, Your Honor, within that ten
18 days. So this is something we would typically see prior to the
19 petition date that we wouldn't really be asking the Court to
20 approve. But here, just because of the nature of this case and
21 when we're doing this sale in this case, that is something that
22 the purchaser asked us to move forward with approving under the
23 commitment letter.

24 THE COURT: I understand it's something that the
25 purchaser asked for, and maybe it happens outside of

1 bankruptcy. But we're in bankruptcy. And any time I see some
2 kind of lockup of the debtor, there's always a fiduciary out,
3 and it doesn't cost anything. And here it looks to me like the
4 fiduciary out costs something, unless I'm misreading. I mean,
5 isn't really what the purchaser wants here is for us to fund
6 his diligence? Isn't that really what's happening?

7 MS. WILLIS: I wouldn't agree with that, Your Honor.
8 Just because it does require entry into the SPA, the diligence
9 will be done before we enter into the SPA. And the bid
10 protections only come into place once the SPA is signed.

11 THE COURT: Okay. What's this other provision then?
12 And you'll probably get to it. But I don't understand the
13 provision, although it is part of the bid protections. Yeah.
14 UpHealth shall reimburse F3C's and Beck's reasonable and
15 documented legal expenses up to such time in pursuit of the
16 transaction. I guess if the debtor backs out.

17 MS. WILLIS: Your Honor, you're reading the commitment
18 letter; is that correct?

19 THE COURT: I'm actually reading --

20 MS. WILLIS: The summary --

21 THE COURT: Summary. Let me find the commitment
22 letter. It's in certain protections on page 3 of the
23 commitment letter.

24 MS. WILLIS: Your Honor, just to clarify that. So
25 that's not an additional expense reimbursement. That is the

1 expense reimbursement. So if we were -- if they were ready,
2 willing, and able to consummate the sale post-have entering
3 into an SPA, entering into the purchase agreement, and they're
4 ready to consummate but we're not, then they would get their
5 expenses, which is the expense reimbursement, as opposed to
6 some additional expense reimbursement.

7 THE COURT: Do they not get the breakup fee in that
8 circumstance?

9 MS. WILLIS: They do not get the breakup fee in that
10 circumstance.

11 THE COURT: When do they get the breakup fee?

12 MS. WILLIS: The breakup fee, they would get when we
13 exercise our fiduciary out, for example.

14 THE COURT: So there's payment to exercise the
15 fiduciary out?

16 MS. WILLIS: That's correct. But Your Honor, I mean,
17 if we were to exercise a fiduciary out, that would be in a
18 situation where, for example, we have another purchaser and the
19 bid that they have submitted is higher and better. And it
20 would be higher and better and inclusive of the breakup fee and
21 the expense reimbursement. I mean, frankly, I would love to be
22 in that position. I'm not sure we're going to get there, but
23 that's not atypical of a 363 sale.

24 THE COURT: That part may not be. The backing-out-
25 without-closing-another-deal would be. The getting-something-

1 when-I-close-another-transaction is not. So that's why I'm
2 saying. It seems like -- it seems like the purchaser really
3 wants us to fund the due diligence.

4 MS. WILLIS: Your Honor, in that situation, it would
5 be that they would just get their expense reimbursement, not
6 their breakup fee, understanding that they have spent some
7 money to get to this point. And that's similar to other 363
8 sales, where they don't receive a breakup fee because there is
9 no other bid. I mean, I hope we're not in a position where we
10 would be backing out of the sale because I truly believe that
11 there is no other way to maximize the value of the TTC assets
12 unless until we sell this asset.

13 THE COURT: Okay. Do you have anything else you want
14 to add?

15 MS. WILLIS: Your Honor, I just, I do want to respond
16 to some of Mr. Schepacarter's points. And one is that he said
17 that the test is if it's necessary to preserve the value of the
18 assets. And he said, certainly, if the purchaser does not move
19 forward, then these assets can still be marketed. But I want
20 to make the point that they have been marketed, and the
21 marketing process was robust. It's detailed in --

22 THE COURT: Why didn't the debtor take this and go to
23 an auction and just say, here's the deal? I guess didn't
24 because there's the diligence wasn't done?

25 MS. WILLIS: Well, Your Honor, a couple of things on

1 that point. We were expecting to go to an auction, I think you
2 might remember.

3 THE COURT: Um-hum.

4 MS. WILLIS: And we did have the bid deadline. At the
5 bid deadline, we didn't have other qualified bids. And the
6 bids that we did have before us, the LOIs that we had before
7 us, this was the most actionable and the best that we had
8 before us. And this requires a private sale.

9 THE COURT: So the others were more tentative than
10 this?

11 MS. WILLIS: Yes --

12 THE COURT: Diligence outs?

13 MS. WILLIS: -- and not qualified bids for many other
14 reasons.

15 THE COURT: Okay.

16 MS. WILLIS: And the other point that I wanted to
17 make, I made this point before, but Mr. Schepacarter talks
18 about the bid protections and having to pay the bid protections
19 with an uncommitted purchaser. But again, the bid protections
20 only come into place if we have a commitment from the purchaser
21 through the entry into the SPA.

22 THE COURT: Again, I do not think I've ever approved
23 bid protections prospectively like that, without the commitment
24 by the purchaser that they're going forward. Because there is
25 no commitment here.

1 MS. WILLIS: Yeah. And Your Honor, that's why we
2 liken it a little bit to a naked sale, where a debtor says, if
3 we did have an opportunity to find a stalking horse bidder and
4 enter into a stalking horse purchase agreement, then we would
5 grant these bid protections.

6 THE COURT: I don't permit those either. I may have
7 on one occasion if I've missed it, but no, I don't do that.
8 What we say is come back to me. You can do it on shorten
9 notice when you have the stalking horse bid, and we'll take a
10 look at it at that point in time. I don't give prospective
11 you-can-offer-three-percent, four-percent, whatever because I
12 don't think that meets a standard. I think we do have to find
13 that it meets a standard.

14 MS. WILLIS: Yeah.

15 THE COURT: And prospective approval doesn't do it.

16 And I guess I also just really not understanding,
17 given the situation we're in, where we went through an entire
18 process and no one else came forward with an actionable bid and
19 this is the only bid that came forward during the process. Why
20 the protections are needed, against whom, and when this
21 prospective purchaser boxed other parties out for a period of
22 time.

23 I think they did a lot of things that you have to take
24 a look at in a package. And they still have a right of first
25 refusal. If somebody came in tomorrow and said, here's thirty-

1 million dollars, they'd still have a right of first refusal on
2 that. So that entire package is -- I don't think it's -- when
3 I look at that package, I can't see how it is value enhancing.
4 You want me to get to the end and say, well, because he'll walk
5 away, or this is the only offer we have, that's sufficient.
6 But I don't think that's the standard.

7 How does this encourage other people to come in and
8 bid? How does this encourage drafting an agreement that can
9 serve as the floor that other peopleglom onto? It's not doing
10 any of that. In fact, it's doing the opposite of that. He's
11 locking things in so that only he, this purchaser, can be the
12 prospective purchaser, certainly for a period of time, and that
13 purchaser is not committed yet. It's difficult to approve
14 something in this context.

15 MS. WILLIS: Your Honor, I agree that they obviously
16 have the exclusivity provision that's only for another ten
17 days. And in the event that we were able to not enter into the
18 SPA, then they would not have those bid protections. So there
19 wouldn't be a floor bid because there would be no purchase
20 agreement. And you're right. They wouldn't have bid
21 protections to protect them against anyone else in that
22 situation. Once we (indiscernible) the SPA then --

23 THE COURT: Right, but then -- like, how I'm reading
24 this --

25 (Pause)

1 MS. WILLIS: Your Honor, if I may, my colleague has
2 reminded me that the right of first refusal also expires on the
3 18th, so that expires in ten days as well.

4 THE COURT: For anything that comes -- it doesn't
5 apply to anything that comes in afterwards. It doesn't expire
6 for anything that the debtor has gotten in the exclusivity
7 period. That's how I read it.

8 If something came in tomorrow, that right of first
9 refusal applies to it. It doesn't expire. If something comes
10 in three weeks from now, it doesn't apply to it, as I read the
11 contract.

12 MS. WILLIS: That's correct.

13 THE COURT: So it's not that it goes away. There may
14 or may not be anything for it to attach to.

15 MS. WILLIS: Right.

16 THE COURT: But that's how I read it.

17 MS. WILLIS: And ultimately, Your Honor, if the
18 commitment letter isn't approved, or at least the binding
19 provisions of the commitment letter aren't approved today, then
20 the debtor faces real risk here, and we would lose very likely
21 the best actionable proposal that we have. So it's currently
22 the highest and best. It's currently the only actionable one
23 we have, or the best actionable proposal we have, for a value
24 of eleven-million dollars. And that is value maximizing to the
25 estate.

1 THE COURT: Only if there's a commitment. If he's
2 committed, I'd say it may be, may be, value maximizing. Okay.
3 If we were past the exclusivity period, if it was committed,
4 even in those circumstances, I still wonder why it's necessary
5 because this has been fully shopped.

6 So if it's been fully shopped, guess there's two ways
7 to argue that. One is the way that that you have argued it,
8 which, from a logic perspective, I guess makes sense, though
9 from a bankruptcy and a standard section may not, but --
10 perspective. But you say, okay, well, nobody else is going to
11 come forward, so what's the likelihood that we're actually ever
12 going to have to pay this out because we've already fully
13 marketed it.

14 MS. WILLIS: That's correct.

15 THE COURT: The flip side of that is it's already been
16 fully marketed, so why is this necessary? So it's a flip side.
17 Okay.

18 Without the commitment, I don't know that this
19 purchaser is serious. And I will take at face value what is in
20 the papers and the testimony, certainly, that I heard that this
21 purchaser has been doing diligence and feels that it needs
22 diligence, notwithstanding that it was an insider. So I don't
23 know how long ago that was. And maybe things have changed.
24 And they need an update. And I'll take all of that at face
25 value that this insider needs to due diligence.

1 MS. WILLIS: Your Honor, can I just make a point on
2 the insider point? So Mr. Beck is a former insider of the
3 debtors. That is true. But Mr. Beck is working with Freedom 3
4 Capital. And Freedom 3 Capital is not an insider of the
5 debtors. They are a completely separate private equity shop
6 they still have investors that they have to answer to, and
7 that's where diligence is necessary.

8 In addition, for this specific asset, because it's in
9 some ways cyclical, there's new information that's sort of
10 coming to bear every month. Mr. Beck resigned in the early
11 part of summer. I believe it was mid-June. We're now in
12 October.

13 THE COURT: Of this year?

14 MS. WILLIS: Of this year.

15 THE COURT: Okay.

16 MS. WILLIS: Yeah. We're now in October. And so the
17 ability of this company of TTC and what they've been able to do
18 financially is completely different than where it was in June.
19 That's sort of why we're here where we are, versus in January,
20 when we were talking about TTC was a very different -- a very
21 different discussion so --

22 THE COURT: Well, if it's different, then maybe they
23 need to run the marketing process again and not be -- and not
24 be confined by an exclusivity period and a no shop and a right
25 of first refusal. I'm not comfortable with this in this state.

1 There is no commitment from this purchaser. That's actually
2 the biggest factor, I think, for me. And then I think the
3 package is too rich when you look at everything in the package,
4 which is not just the breakup fee and the expense reimbursement

5 I recognize that in smaller deals, and I would
6 consider this, on that relative scale, a smaller deal,
7 sometimes the expense reimbursement, at least, could be
8 disproportional to what we normally look at because the
9 expenses are what they are. I recognize that.

10 MS. WILLIS: Correct, Your Honor.

11 THE COURT: The breakup fee, I think, doesn't need to
12 be disproportional. I understand a larger expense side than
13 one would hope for.

14 But I think you have to look at the entire package of
15 what this prospective purchaser wanted and in the context of a
16 lack of commitment. And I just can't approve it in this form.

17 Now, they want to continue their diligence, come back
18 with a commitment. Consider what I have said here. There
19 might be, might be, a package that might be appropriate. I
20 still might have an objection from the U.S. Trustee on meeting
21 the standard, but we'll see.

22 I've also had circumstances in which I did not approve
23 the bid protections, and by that, I mean the breakup fee and
24 the expense reimbursement solely, not the entire package we
25 have here. But I've had situations where I didn't think the

1 debtor made its case at this level. But I said, if you want to
2 come back to me after. There's been the debtor has closed a
3 transaction with somebody else and convinced me that you meet
4 the standard now, I would consider that. And at least one
5 instance, I have granted bid protections after the fact when
6 they were warranted when they closed with someone else.

7 So there are opportunities for this purchaser, to the
8 extent it makes an appropriate contribution to the case under
9 the relevant Third Circuit standards, to come back. But in
10 this uncommitted scenario, I don't think it's appropriate. I'm
11 not going to approve it at this time.

12 MS. WILLIS: Thank you, Your Honor. I did take part
13 of what you said to mean that we could come back once the SPA
14 was signed?

15 THE COURT: If you have a commitment, that makes a
16 difference, and it may make a difference to the Office of the
17 United States Trustee. I would also consider the other
18 comments in terms of what that package is. And if, at that
19 point, the exclusivity period has ended. And I don't know what
20 I do about the right of first refusal. Maybe it will be moot
21 because maybe there wouldn't have been anything in the
22 meantime. Then we can consider the protections in that
23 context. At least we'd be in a more typical context.

24 MS. WILLIS: Understood, Your Honor. Thank you very
25 much.

1 THE COURT: Thank you.

2 Was that our only matter for today?

3 MR. MARTIN: That is the agenda, Your Honor. Just as
4 a matter of housekeeping, do you want to have anything from us
5 to mark that denial and order, or do you want to just mark it
6 on the docket as denied? Happy to do whatever the Court
7 prefers. I know you --

8 THE COURT: Why don't you do an order that says denied
9 without prejudice so that if, in fact, the purchaser wants to
10 come back, either after a commitment or in the event that there
11 is an alternative transaction, that that is not foreclosed. So
12 a without prejudice.

13 MR. MARTIN: We'll draft a quick order. Should be
14 easy. We'll run it by Mr. Schepacarter and the committee and
15 submit it under certification of counsel to ensure that the
16 records are accurate that this was disposed of.

17 THE COURT: Let me ask this one question I probably
18 should have asked. I know the testimony was that the debtor
19 wouldn't expect the transaction to close within the next two
20 weeks or whatever. Is there any sense of when, if, in fact, an
21 actual agreement is signed, it could close?

22 MR. RILEY: Yeah. I think the answer to that is we
23 don't have a sense because we have regulatory approvals --

24 THE COURT: Regulatory approval?

25 MR. RILEY: -- that would do the end of November at

1 the earliest.

2 MR. MARTIN: You may not have heard Mr. Riley. He
3 says there are regulatory issues that even at the earliest that
4 would not be before the end of November. Obviously, we have to
5 enter into an SPA with buyer and then submit those. So that, I
6 believe, is --

7 THE COURT: I was going to say that requires a
8 committed agreement, right?

9 MR. MARTIN: Yeah.

10 THE COURT: Okay.

11 MR. MARTIN: So I don't know if there's a target end
12 date, but it doesn't look like before the end of November is
13 today's answer to that question, Your Honor.

14 THE COURT: Okay. I appreciate that. Thank you.
15 Okay. We're adjourned.

16 IN UNISON: Thank you, Your Honor.

17 (Whereupon these proceedings were concluded at 2:58 PM)
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C E R T I F I C A T I O N

I, River Wolfe, certify that the foregoing transcript is a true
and accurate record of the proceedings.



October 10, 2024

RIVER WOLFE (CDLT-265)

DATE

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